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Using United States Antitrust Laws Against the Keiretsu as a Wedge into the Japanese Market.

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I. INTRODUCTION

In an effort to open foreign markets to competition from United States exports,[1] the U.S. Department of Justice announced, on April 3, 1992, a change in policy regarding anticompetitive conduct that restricts U.S. exports.[2] The Department of Justice can now use U.S. antitrust laws to challenge foreign business conduct that harms U.S. exporters if the conduct violates U.S antitrust laws.[3] The policy change enables the U.S. government to use antitrust law as a tool to open foreign markets to U.S. exports.[4]

The justification for this extraterritorial enforcement of U.S. antitrust laws is based on the basic policy underlying the laws:[5] Their enforcement preserves and promotes competition.[6] The prior policy, which limited enforcement to situations where U.S. consumers had been harmed, restricted antitrust law enforcement to the domestic and import markets.[7] However, competition is international in today's global economy,[8] and exports are of critical importance.[9] The Justice Department policy recognizes the significance of

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1. *Antitrust: U.S. Broadens Enforcement Posture on Foreign Application of the Sherman Act*, Int'l Trade Rep. (BNA) No. 9, at 622 (Apr. 8, 1992) [hereinafter *U.S. Broadens Enforcement*] (discussing the reasons for the policy change and highlighting some reactions to its broader enforcement posture).

2. ANTICOMPETITIVE CONDUCT THAT RESTRICTS U.S. EXPORTS: STATEMENT OF ANTITRUST ENFORCEMENT POLICY, DEPT. OF JUSTICE (Apr. 3, 1992) [hereinafter POLICY STATEMENT]. In part the policy statement provides that:

> The Department of Justice will, in appropriate cases, take antitrust enforcement action against conduct occurring overseas that restrains United States exports, whether or not there is direct harm to U.S. consumers, where it is clear that:
>
> (1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States;
>
> (2) the conduct involves anticompetitive activities which violate the U.S. antitrust laws--in most cases, group boycotts, collusive pricing, and other exclusionary activities; and,
>
> (3) U.S. courts have jurisdiction over foreign persons or corporations engaged in such conduct.

Id. This policy statement in no way affects existing laws or established principles of personal jurisdiction. *Id.*

3. *Id.* One of the motivations for announcing this policy statement was to correct interpretations of a footnote in the Justice Department's 1988 Antitrust Enforcement Guidelines for International Operations. *Id.* These interpretations have restricted enforcement to where direct harm to consumers could be shown. *See id.* (Statement of James R. Rill, Assistant District Attorney).

4. *U.S. Broadens Enforcement*, *supra* note 1 at 622. *See*, Douglas E. Rosenthal & Robert A. Lipstein, Remarks at the Presidential Showcase Program of the 1992 Annual Meeting of the American Bar Association (Aug. 11, 1992) (transcript on file at *The Transnational Lawyer*) (discussing approaches that have been used to address the problem of opening Japanese markets, including the infrequent use of U.S. antitrust law).

5. POLICY STATEMENT, *supra* note 2. (Statement of William P. Barr, Attorney General).

6. *Id.* One underlying principle of antitrust law is that competitive markets are beneficial to society. E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 1 (1988). There have been arguments by some scholars that the primary purpose for the Sherman Act was the promotion of economic efficiency. *Id.* at 3. While the legislative history of this enactment shows that multiple goals were expressed, the consensus today is that the main purpose is to encourage competition. *Id.* at 3-4. In its application of these laws, the Supreme Court has stated that the antitrust laws were enacted for the protection of competition and not competitors. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc, 429 U.S. 477, 488 (1977).

7. POLICY STATEMENT, *supra* note 2. (Statement of James R. Rill, Assistant District Attorney).

8. *Id.* (Statement of William P. Barr, Attorney General).

9. *Id.* (Statement of James R. Rill, Assistant District Attorney).

export trade and shows that its concern for competition will not be limited to the domestic aspects of U.S. trade.[10]

The U.S. has experienced years of trade deficits with Japan and has made repeated requests to the Japanese government to open its country's market to exports.[11] Even though the policy is not aimed at any particular country, Japan's Fair Trade Commission Chairman Setsuo Umezawa reacted quickly to the announcement of the change in policy and issued warnings to the Department of Justice to proceed with care in pursuing enforcement.[12] Chairman Umezawa indicated concern that the *keiretsu* practices may be a target.[13] *Keiretsu* refers to a type of industrial grouping which has developed in the Japanese economy.[14] The industrial groupings consist of several companies linked together through a variety of formal and informal institutions and practices.[15] The following are common features of a *keiretsu*: (1) networks of debt capital; (2) stable shareholding and cross-shareholding; (3) shared directorships and seconded senior managers;[16] (4) executive councils; and (5) common traditions and shared corporate assets, for example, company logos.[17] Several types of *keiretsu* can be distinguished on the basis of the business activities they engage in.[18]

The U.S. government and some U.S. exporters believe the *keiretsu* relationships promote exclusion of outside parties and act as a barrier to companies seeking to enter the Japanese market.[19] At the Structural Impediments Initiative talks (SII),[20] the U.S. and Japan discussed the issue of *keiretsu* relationships and business practices. The U.S. government urged restructuring of this feature of the Japanese economy.[21]

With the policy allowing for redress of harm to exporters and the *keiretsu* identified as a potential trade barrier, the issue of whether the *keiretsu* structure and relationships violate

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10. *Id.* The Justice Department did reaffirm its commitment to the recognition of international comity and indicated that if the conduct would also be illegal under the antitrust laws of the other country and that country was willing to enforce their laws, then the Justice Department would cooperate with the other country. *Id.*

11. Jacob M. Schlesinger, *Japan's Saber Rattling May Be Just That*, N.Y. TIMES, Feb. 10, 1993, at A11. In 1992, the U.S. trade deficit with Japan was 42 billion dollars. *Id.*

12. *Japan: Head of Japan's FTC Asks Justice to Reconsider Antitrust Decision*, Int'l Trade Rep. (BNA) No. 9, at 688 (Apr. 15, 1992). *See also, U.S. Broadens Enforcement, supra* note 1, at 622 (reporting that the Japanese Ministry of International Trade planned to launch a study to examine the policy decision).

13. *Id.*

14. CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE 10-11 (1982) (describing the structure as "the oligopolistic organization of each industry by conglomerates.").

15. PHASE I: JAPAN'S DISTRIBUTION SYSTEM AND OPTIONS FOR IMPROVING U.S. ACCESS, HOUSE COMM. ON WAYS AND MEANS, H.R. Doc. No. 332-283 vii (1990) [hereinafter PHASE I].

16. *Id.* at 50. Seconded senior management refers to retired or dual service executives. *Id.* With the intermarket *keiretsu*, the central bank may have retired executives that go to work for affiliate companies or executives that serve in dual capacities. *Id.* In the distribution *keiretsu*, the manufacturers place secondment managers in the distribution sector. *Id.* at 54 n.325.

17. *Id.* at 56.

18. *Id.* at vii.

19. Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICH. J. INT'L L. 436, 443 (1991). PHASE I, *supra* note 15, at 56.

20. Matsushita, *supra* note 19, at 436. The Structural Impediments Initiative (SII) was a series of bilateral trade negotiations which were completed in June 1990. *Id.* at 436.

21. *See id.* at 440. The final report of the Structural Impediments initiative listed six areas in which Japan was urged to restructure. *Id.* The five other areas are savings and investment patterns, land policy, system of production distribution, exclusionary business prices, and pricing mechanisms. *Id.*

U.S. antitrust laws has emerged.[22] This Comment addresses this question and some additional policy concerns which must be considered if Japanese *keiretsu*-ized industries are found to be in violation of U.S antitrust laws. Section II describes the historical development of the *keiretsu* and its modern structure.[23] Section III sets up a hypothetical *keiretsu* structure.[24] Section IV analyzes whether the hypothetical would violate U.S. antitrust law if the conduct occurred within the U.S., and then explores whether subject matter jurisdiction can be established.[25] Section V highlights other issues which must be considered prior to applying U.S. antitrust laws against the *keiretsu*.[26] Section VI discusses the potential use of antitrust law enforcement on the *keiretsu* as a wedge into the Japanese market.[27]

II. *KEIRETSU* STRUCTURE

The *keiretsu* structure has roots in the history of Japan. Its predecessor was the *zaibatsu*.[28] In order to foster an appreciation for the development of the *keiretsu* structure and its modern configurations, a brief history of the *zaibatsu*, the evolution of *keiretsu* structure, and the profiles of its distinct forms must be analyzed.

A. History

A *zaibatsu* consisted of a central holding company which acted as the control center for directing a unified business strategy for a large complex of companies, including other holding companies.[29] The companies within a *zaibatsu* did not operate for their own individual advantage, but instead functioned collectively for the advantage of the top holding company.[30] The *zaibatsu* were all conglomerates whose goal was to achieve oligopolistic positions of ten to twenty percent of the market output in a wide variety of industries.[31] The devices used to control the complex of companies consist of ownership or shareholding, appointment of chairmen and officers, finances, and central buying and selling. [32]

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22. *See* Clyde H. Farnsworth, *Antitrust Extension is Weighed*, N.Y. TIMES, April, 16, 1990, at D1, D7 (presenting the debate that was occurring prior to the extension of antitrust laws and citing, as an example, the Japanese auto industry which is keiretsu-ized).

23. *See infra* notes 28-62 and accompanying text.

24. *See infra* notes 63-91 and accompanying text.

25. *See infra* notes 92-223 and accompanying text.

26. *See infra* notes 224-46 and accompanying text.

27. *See infra* notes 247-48 and accompanying text.

28. JOHNSON, *supra* note 14, at 174.

29. ELEANOR M. HADLEY, ANTITRUST IN JAPAN 20 (1970). The corporations together with the holding companies are referred to as combines. *Id.* Some people use the term *zaibatsu* only to designate family-dominated combines while others use it to refer to all combines. *Id.* at 20-21. Unless otherwise designated in this text as family-dominated, *zaibatsu* will be used to refer to all combines.

30. *Id.* at 23.

31. *Id.* (distinguishing this feature of Japanese combine from combines in the West which are built on one industry or a group of industries with the goal of gaining a monopoly).

32. *Id.* at 28. In more detail, the devices are (1) direct ownership of key subsidiaries, cross-ownership holding between the subsidiaries, and family share holdings where applicable; (2) direct appointment of chairman and officers or direct appointment of chairman with the top holding company having final approval; (3) officer interlocks; (4) financing on an intra-zaibatsu basis; (5) buying and selling through the zaibatsu trading company; and (6) feudalistic loyalty to the top family, where applicable. *See id.* at 28-31.

During the U.S. occupation of Japan at the end of World War II, General MacArthur received directives ordering t he dissolution of the *zaibatsu* because they were viewed as having influenced Japan's entry into the war and as a potential impediment to the democratization of Japan.[33] One of the primary means of accomplishing the dissolution entailed outlawing holding companies, which the Supreme Commander of the Allied Powers (SCAP) achieved when it forced the Japanese Diet to enact the Antimonopoly Law (AML).[34] The AML essentially combined the antitrust legislation existing in the U.S. at that time, namely; the Sherman Act, the Clayton Act, and the Federal Trade Commission Act.[35] Soon after the occupation was over, the Japanese government amended the AML and allowed for cross shareholding and interlocking directorates, which had been outlawed.[36] Holding companies remain illegal.[37] These post-occupation amendments, plus the fact that banks were not targeted by the deconcentration,[38] allowed for the *keiretsuka*[39] of the Japanese economy.[40] Without a top holding company, the *zaibatsu* were restructured on the basis of their banks.[41] This new structure, the *keiretsu*, proved to be a much more rational and effective business arrangement, but it is certain that this is not exactly what SCAP had in mind when dissolving the *zaibatsu*.[42]

B. Defining the Modern Structure

In the restructuring of industrial groupings, different types of *keiretsu* were formed.[43] Today, the types have been divided into two broad classifications, inter-market *keiretsu* and intra-market *keiretsu*.[44] These classifications are based upon whether the *keiretsu* firms have a wide diversification of products (inter-market) or whether its companies embody the successive stages of production and sale in a single or limited number of related industries (intra-market).[45]

The reciprocal and interdependent relationships typifying the *keiretsu* manifest themselves in various horizontal and vertical business practices.[46] The vertical practices predominate in the intra-market *keiretsu* and generally include resale price maintenance

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33. *Id.* at 4-6.

34. Michiko Ariga, *Japan, in* COMPETITION LAWS OF THE PACIFIC RIM COUNTRIES JAP-1-14 (Julian O. von Kalinowski ed., 1991). The legislature of Japan is called the Japanese Diet.

35. *Id.*

36. *Id.* at JAP-2-13.

37. *Id.*

38. HADLEY, *supra* note 29, at 72. Financial institutions played a central role in the formation of the *zaibatsu* because of the partiality shown by commercial bank to their subsidiaries. *Id.* Therefore, it was a strange for them to be omitted from the list of holding companies that had to be dissolved. *Id.* A partial explanation has been offered that it was not an item Americans in charge of deconcentration would focus on because U.S. commercial banks are not permitted to have industrial and trading subsidiaries. *Id.*

39. JOHNSON, *supra* note 14, at 110 (discussing the structuring of the economy into conglomerates)

40. *Id.* at 174.

41. *Id.*

42. *Id.*

43. HADLEY, *supra* note 29, at 257. Groupings based on credit sources are called *kinyo keiretsu. Id.* Those founded on a raw material supplier and/or a product finisher are called *kigyo keiretsu. Id.* Others where the products were technologically related and transportation cost were high were called *kombinato. Id.*

44. PHASE I, *supra* note 15, at 48.

45. *Id.*

46. *Id.* at 147.

(RPM),[47] rebates,[48] exclusive dealing arrangements,[49] and liberal return policies.[50] Horizontal practices which characterize the inter-market *keiretsu* include price fixing and market allocation.[51]

1. Inter-market Keiretsu

The most well known *keiretsu* are the inter-market *keiretsu,* which are also referred to as the "Big 6."[52] They are organized around a bank and include large manufacturing firms, a large general trading company, insurance companies, and trust banks.[53] These concerns are linked more by finances than by products.[54] The large general trading company, referred to as the *sogo shosha,* coordinates some of the companie's activities and plays an important role in both its exports and domestic distribution.[55] The inter-market *keiretsu* is also known as horizontal *keiretsu* because the members are nearly co-equal, and the structure approaches the conglomerate style of organization.[56]

2. Intra-market Keiretsu

The intra-market *keiretsu* are characterized by their hierarchical organization.[57] They are focused in a single or limited number of related industries.[58] Their composition includes one or more large independent companies, their subsidiaries and affiliates, and these subsidiaries' affiliates.[59] In general, they have stronger equity ties than inter-market *keiretsu,* and these ties are typically one-directional as opposed to cross-shareholding.[60]

A specialized subset of this type of *keiretsu,* the distribution *keiretsu,* has been formed by strong manufacturers and exists in a small number of industries, namely automobiles,

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47. *See infra* notes 86-91 and accompanying text (explaining functions of RPM).

48. *See infra* notes 79-85 and accompanying text (describing the purpose and utility of the rebate system of the distribution *keiretsu*).

49. *See infra* notes 76-78 and accompanying text (outlining the various types of exclusive dealing practices).

50. *See infra* notes 89-91 and accompanying text. PHASE I, *supra* note 15, at 101. These practices are usually attributed to distribution *keiretsu. Id.*

51. PHASE I, *supra* note 15, at 101. These practices are mainly associated with cartels or industry and trade associations. *Id.*

52. *Id.* at 50. These *keiretsu* groupings are Mitsubishi, Mitsui, Sumitomo (descendants of three of the major *zaibatsu*), and Fuyo, DKB, and Sanwa. *Id.* at 51.

53. *Id.* at 50.

54. *Id.*

55. PHASE I, *supra* note 15, at 50.

56. *Id.* at 48. A conglomerate is a corporation that has diversified its operations usually by acquiring unrelated enterprises in widely varied industries. BLACK'S LAW DICTIONARY 301 (6th ed. 1990). Such individual businesses are normally controlled by a single corporate entity. *Id.* However, the inter-marker *keiretsu* firms remain independent companies, which makes the links much weaker that American or European conglomerates. *Id.* at 48 n.310.

57. PHASE I, *supra* note 15, at 53.

58. *Id.* There are several dozen of these vertical grouping, and include such organizations as Toyota and Nissan in the automobile industry, Hitachi and Matsushita in electrical machines and electronics industry, and Nippon Steel in the iron and steel industry. *Id.*

59. *Id.* The total number of firms can be anywhere between 6 to 36. *Id.*

60. *Id.* at 54. In Japan, shareholding in non-financial companies is not subject to the five percent legal limit for banks or the ten percent limit for insurance companies. *Id.*

consumer electronics, optics, cosmetics, pharmaceuticals, newspapers, and processed food.[61] They are generally formed around a manufacturer, integrated downstream into the distribution, marketing, and sale of finished products, and result in a captive channel.[62] It is this type of *keiretsu* which this Comment analyzes in depth.

III. MODEL STRUCTURE

The discussion above demonstrates that the *keiretsu* structures are diverse and engage in a variety of business practices. As certain features predominate in each structure, the structures should be addressed separately for purposes of detecting violations of U.S. antitrust laws.[63]

A hypothetical situation is outlined below. The business practices in which the hypothetical companies engage resembles the distribution *keiretsu* for several reasons. First, an antitrust challenge to the practices of the distribution *keiretsu* has a greater probability of success than a suit against inter-market *keiretsu*.[64] Distribution is clearly essential for getting U.S. products to the Japanese consumers.[65] Finally, many of the industries in which this type of *keiretsu* exist are important to the U.S. economy and have been under study by the Federal Trade Commission.[66]

A. *Hypothetical*

The following hypothetical illustrates a close approximation of the actual consumer electronics market in Japan. Minor adjustments have been made for simplification purposes.[67]

Teltek, a U.S. corporation, has been trying to export its line of camcorders to Japan. After complying with all importation requirements,[68] Teltek approached a variety of wholesalers and retailers in Japan. Even though Teltek's camcorders are competitively

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61. PHASE I, *supra* note 15, at vii, 54. Distribution *keiretsu* are called *ryutsu keiretsu*. *Id.* at 54.

62. *Id.* at 54.

63. *Id* at 48. Overlapping of the different types of *keiretsu* exists. *Id.*

64. *See id.* at 56-57 (explaining that the inter-market *keiretsu* create problems that are more subtle than addressing a "proprietary" distribution channel and involve fundamental aspects of Japanese business conduct that will be significantly more difficult to change). Furthermore, in Japan, the growth of the distribution *keiretsu* has been identified as an antitrust policy issue and a target for reform. *Id* at 56, 107.

65. *Id.* at 56. All of the *keiretsu* impact distribution in Japan. *Id.*

66. INDUSTRY & TRADE SUMMARY, TELEVISION RECEIVERS AND VIDEO MONITORS, USITC PUBLICATION 2445 (Jan. 1992). GLOBAL COMPETITIVENESS OF U.S. ADVANCED-TECHNOLOGY MANUFACTURING INDUSTRIES: COMMUNICATIONS TECHNOLOGY AND EQUIPMENT, USITC PUBLICATION 2439 (Oct. 1991). GLOBAL COMPETITIVENESS OF U.S. ADVANCED-TECHNOLOGY MANUFACTURING INDUSTRIES: PHARMACEUTICAL, USITC PUBLICATION (Sept. 1991).

67. *See* ERICH BATZER & HELMUT LAUMER, MARKETING STRATEGIES AND DISTRIBUTION CHANNELS FOR FOREIGN COMPANIES IN JAPAN 195-208 (1989) (supplying statistics).

68. *Id.* at 27. Administrative requirements placed on exporters to Japan have been considered non-tariff trade barriers. *Id.* They include expensive, non-uniform procedures, non-transparency legislation, orders and implementation, and approval authorities not accepting industrial goods which met international norms. *Id.* Since 1985, Japan has removed some of these impediments and implemented simplified testing and examination procedures. *See id.* at 29. *See also* PHASE I, *supra* note 15, at 198 (describing other non-tariff trade barrier and explaining the actions taken by the Japanese government to alleviate some of these burdens).

priced and are of a quality comparable to similar products being sold, it has been unable to find an outlet for its products in Japan.

1. Market Overview

The Japanese market for electrical consumer durables is strongly oligopolistic.[69] The largest Japanese manufacturers will be designated as K1, K2, K3, K4, K5, K6, K7 and K8.[70] However, K7 does not manufacture camcorders.

The seven that do manufacture camcorders occupy eighty percent of the market for this product (See Table 1).[71] Of these seven, the three largest manufacturers occupy sixty percent of the overall consumer electronics market in Japan. Small and medium sized manufacturers have captured seventeen percent, with the remaining three percent divided among foreign importers.[72]

The eight largest companies and a few of the medium sized firms distribute their products through wholesalers which they own or through wholesalers in which they have capital holdings.[73] Frequently these goods pass through an additional wholesaler prior to reaching a retailer. The number of wholesalers tied to each of the top eight firms ranges from ten to one hundred (See Table 1).[74]

These wholesalers in turn supply over 60,000 retailers which are tied to the manufacturer through some form of exclusive dealing arrangement (See Table 1). These 60,000 retailers represent more than eighty percent of the total number of sales outlets.[75] Generally, eighty to ninety percent of the turnover of a tied retailer is generated from product sales by the manufacturer to which it is tied. The remaining turnover results from sales of products from one or two other manufacturers which have products that compliment the tied manufacturer's line.

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69. BATZER & LAUMER, *supra* note 67, at 195. Oligopoly is a market structure characterized by few producers, or in other words a concentrated market. SULLIVAN & HARRISON, *supra* note 6, at 32. This structure allows the sellers to perceive that their interdependent action will be more profitable than independent action. *Id.* Interdependence suggests that each seller takes into account the actual or potential market reaction of competitors before output and price decisions are made. *Id.* Reaction, coordination, and strategic behavior are important elements of oligopoly behavior. *Id.*

70. BATZER & LAUMER, *supra* note 67, at 196. The eight keiretsu are Matsushita, Toshiba, Hitachi, Mitsubishi, Sanyo, Sharp, Japan Victor, and Sony. *Id.*

71. *Id.* The actual individual market shares of the eight largest manufacturers of consumer electronics in Japan generally range up to a high of 30 percent. *Id.* However, in some products, Matsushita has a product share of up to 40 percent. *Id.* at 224 n.24.

72. *Id.* at 195. In Japan in 1984, only 1.6 percent of the domestic supply of entertainment electronics equipment came from imports, and less than 1 percent of domestic electrical appliances were imports. *Id.*

73. *Id.* at 196.

74. BATZER & LAUMER, *supra* note 67, at 196. For cost reasons, in the 1980's the eight largest companies decreased their tied wholesalers from a combined total of 597 to 247. *Id.*

75. PHASE I, *supra* note 15, at 106 (Table 13). In 1982, 82.1% of the electrical appliances retailers, 66.7% of the cosmetic retailers, and 50.4% of the automobile retailers were tied to the manufacturers' own marketing system. *Id.*

TABLE 1
CONTRACTUAL TIES AND CAMCORDER
MARKET SHARE OF TOP EIGHT JAPANESE MANUFACTURERS

	Wholesalers	Retailers	Market Share
K1	100	20,000	25%
K2	60	14,000	18%
K3	30	11,000	14%
K4	20	5,500	10%
K5	15	4,000	7%
K6	10	2,000	3%
K7	10	1,500	0%
K8	10	1,000	3%
Total	**255**	**60,000**	**80%**

2. Business Operations of a Keiretsu

In the following description of the business practices of the eight largest manufacturers, K2 is used as the representative manufacturer. The figures for K2 from Table 1 are utilized for purposes of discussion. This has been done in order to simplify the model and because these business practices are to some degree engaged in by all of the distribution *keiretsu*.

K2 distributes its products through sixty wholesalers. Of these wholesalers, twenty are owned by K2, and K2 has capital holdings in the other forty.[76] In turn, these wholesalers distribute the K2 line of products to a group of 14,000 retailers, many of which are the "mom and pop" type stores which predominate the japanese retail sector.[77]

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76. *Id.* at 90. In Japan, stock ownership of 10% to 20% can serve as the basis for significant influence. *Id.*

77. BATZER & LAUMER, *supra* note 67, at 54. Japan has a unique retail sector which features a much denser retail network than the U.S. *Id.* There are almost twice as many retail outlets in Japan than there are in the U.S., which has twice the population. *Id.* One reason for this feature of the Japanese economy is that for years the Japanese government has followed a policy of protecting small businesses, with the goal of enabling as many Japanese as possible to earn a living. *Id.* at 52. This policy is furthered by the Large Retail Scale Law, which due to its amendment in 1979, requires a consultation procedure for the opening of any store larger than 500 square meters, and this consultation procedure entails obtaining the approval of the small competing retailers. *Id.* at 53. The effect has been to make it virtually impossible for any sizable new store to open. *Id.* The limit on store size affects export to Japan because there is evidence that larger stores sell more imported products than the small retailers. PHASE I, *supra* note 15, at 74-74. Toys 'R' Us is attempting to gain entry into the retail sector by going through these procedures, and it is being viewed as a test case for other large U.S. retailers. *Id.* at 78.

K2 has arranged for these retailers to exclusively carry its product line, which includes camcorders. Sixty percent of the retailers have exclusive dealing clauses in their contracts.[78] Another twenty percent do not have such clauses, but K2 has extended credit to them or holds equity in their stores, and, as a result, the owners feel obligated not to sell a competing brand in their stores. Ten percent sell only the K2 brand because they fear reprisals from K2 should they begin to sell a competing brand within their store. The remaining ten percent cannot technically be considered exclusive dealers because they sell a few of the products of a rival manufacturer which complement the K2 line. However, these goods do not compete with K2 products.

K2 employs a rebate system to enforce exclusive dealing and to promote sales.[79] With exclusive sales cooperation rebates, the amount of rebate is dependent upon the share of sales among competitive items and acts as an incentive for dealers to be exclusive dealers.[80] Additionally, there are rebates based on amount of display space.[81] Other sales rebates include awards for target achievement and opening new channels.[82] Furthermore, the rebates can be used by K2 as a means of insuring conformity with the manufacturer's policies.[83] A retailer may find its year-end rebate cut if it does not follow K2's suggestions.[84] This rebate usually represents the profit of the small business.[85]

The wholesalers and retailers tied to K2 have entered into agreements with K2 to prohibit the resale of its products below a stipulated price.[86] Some of these agreements are formalized in contracts, but others are informal.[87] This practice is called Resale Price Maintenance (RPM), and under AML it is illegal.[88] K2 has a liberal policy for the return of unsold merchandise.[89] K2 in some cases gives credit, and in others issues rebates.[90] One of the reasons for this policy is to ensure that the prices for its goods will be maintained

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78. Howard P. Marvel, *Exclusive Dealing*, 25 J. L. & ECON. 1 (1982). Exclusive dealing can be defined as a contractual requirement by which the retailers or distributors promise a supplier that they will not handle the goods of competing producers. *Id.* This type of agreement must be distinguished from exclusive dealerships where a manufacture reserves a class of customer or territory for a particular dealer. *Id.* n. 1. Unlike an exclusive dealing arrangement, the primary impact of an exclusive dealership is on intrabrand competition. SULLIVAN & HARRISON, *supra* note 6, at 178. A manufacturer will condition the sale of its product on an agreement of the purchaser to buy all of its requirements for this product from the manufacturer. *Id.*

79. PHASE I, *supra* note 15, at 109-10. This use of the term rebate does not involve any payments to consumers. *Id.* at 109. Rebates include practices that are known in the U.S. as volume discounts, cash discount, and advertising allowances. *Id.* 109-10. Generally rebates are handled on a confidential basis to prevent having rebates compared with those of competing suppliers. *Id.* at 110.

80. *Id.*

81. *Id.*

82. *Id.*

83. PHASE I, *supra* note 15, at 110.

84. *Id.* (quoting a presentation to the Japanese Fair Trade Commission).

85. *Id.* at 110.

86. *Id.* at 107.

87. *Id.*

88. *Id.* at 107. "[T]he Japanese distribution *keiretsu* are unparalleled in strength and breadth. Today they function primarily as a mechanism through which resale prices can be controlled by the manufacturers and thus preserve de facto resale price maintenance despite its prohibition under the Antimonopoly and Fair Trade Law." *Id.* (quoting Hideto Ishida, *Anticompetitive Practices in the Distribution of Goods and Services in Japan: The Problem of the Distribution Keiretsu*, 2 J. JAPANESE STUD. 325 (1983)). *See supra*, note 47 and accompanying text (defining RPM).

89. *Id.*

90. *Id.* at 108.

at a certain level so that the retailers will not have to sell them at a discount to get them out of their stores.[91]

IV. Applying United States Antitrust Law to the Hypothetical *Keiretsu*

Exclusive dealing and RPM raise the most substantial antitrust concerns. However, the practice of RPM would not be attacked by Teltek in an antitrust case because the effect of the practice is to maintain prices at a level above the price that would result from a market free from restraint.[92] While this is a concern for local government and consumers, it would enable Teltek, if it can gain entry, to compete in the Japanese market by selling below the prices established by the RPM agreements.

The most likely target for an antitrust suit by Teltek is the exclusive dealing arrangements. This includes the exclusive dealing contracts, the impact that the rebate system has on maintaining exclusive dealing with or without a contract, and the potential anticompetitive effects of the manufacturer's capital holdings in the retailers. In Teltek's situation, this exclusivity has effectively closed eighty percent of the distribution channels to its products. The thrust of Teltek's lawsuit is that the exclusive dealing practice of the *keiretsu* has harmed Teltek by erecting a barrier to its exports in violation of U.S. antitrust law.

The discussion below analyzes first whether the exclusive dealing of the *keiretsu* could be found to violate U.S. antitrust law, specifically the Sherman Act and the Clayton Act. Then, this Comment explores whether Teltek could establish, under either of these statutes, the subject matter jurisdiction necessary to pursue the substantive merits of its antitrust claim.[93] The answers to these questions will determine whether U.S. antitrust laws can be used as a wedge to enter the Japanese market.

A. *Supreme Court Precedent for Exclusive Dealing Contracts*

Both section 1 of the Sherman Act[94] and section 3 of the Clayton Act[95] govern aspects of exclusive dealing in private suits.[96] Teltek will experience a heavier burden of proof in

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91. *Id.* at 109.

92. *See* Sullivan & Harrison, *supra* note 6 at 158-65 (describing the economic impact of RPM).

93. An analysis of the requirements for establishing personal jurisdiction in this context is beyond the scope of this article.

94. 15 U.S.C. § 1 (1993).

95. 15 U.S.C. § 14 (1993).

96. Earl W. Kintner, 2 Federal Antitrust Law 278-79 (1980). Sullivan & Harrison, *supra* note 6 at 178. Cases dealing with commodities generally apply section 3 of the Clayton Act, and cases not concerning the commodities have applied section 1 of the Sherman Act. *See* Richard, M. Steuer, *Exclusive Dealing in Distribution*, 69 Cornell L. Rev. 101, 103 n.12 (1983). Section 5 of the Federal Trade Commission (15 U.S.C. 45 (1993)) also governs exclusive dealing. *Id.* Like the Sherman Act, this Act has a provision expressly governing extraterritorial subject matter jurisdiction. Daniel T. Murphy, *Moderating Antitrust Jurisdiction: The Foreign Trade Antitrust Improvements Act and the Restatement of Foreign Relations (Revised)*, 54 U. Cin. L. Rev. 779, 785 (1986). However, as the FTC Act is not applicable in private suits, a U.S. manufacturer is limited to filing a complaint with the Commission, which will then decide whether or not to sue the foreign company or companies. *See* Steuer, *supra*, at 103 n.12.

an antitrust challenge under the Sherman Act than in a claim under the Clayton Act.[97] This results from the different language employed in the statutes. Section 1 of the Sherman Act speaks of actual restraints of trade, while section 3 of the Clayton Act deals with activities which may substantially lessen competition.[98] Additionally, the analytical approaches under the two statutes differ to some degree.[99] The respective burdens of proof and analytical approaches are outlined below, and Teltek's situation is analyzed under each of these separate standards.

1. The Clayton Act

The two most influential Supreme Court decisions in the area of exclusive dealing, *Standard Oil Co. v. United States*[100] and *Tampa Electric Co. v. Nashville Coal Co.*,[101] applied section 3 of the Clayton Act.[102]

In *Standard Stations*, the Supreme Court addressed the issue of whether exclusive dealing contracts between Standard Oil and independent retailers in the market region, referred to as the "Western Area," violated section 3.[103] After analyzing the prior exclusive dealing cases and reviewing the congressional intent behind the Clayton Act, the Court determined that "§ 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."[104] Standard controlled twenty-three percent of this market.[105] Sales under exclusive dealing contracts with independent service stations made up six and seven-tenths percent of Standard's total sales.[106] Standard exclusive dealing contracts tied sixteen percent of the independent retailers in the area.[107] Applying a quantitative substantiality standard, the Court concluded that Standard's exclusive dealing contracts foreclosed these channels to competitors, and that this six and seven-tenths percent of the petroleum market was a substantial share of the market under section 3.[108] The court noted that Standard's major competitors, which comprised forty two and one half percent of the market, also utilized exclusive dealing contracts.[109]

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97. KINTNER, *supra* note 96, at 286-287; Twin City Sportservice, Inc. Charles O. Finly & Co., 512 F.2d 1264, 1275 (9th Cir. 1975); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3rd Cir. 1975).

98. Twin City Sportservice, Inc. v. Charles O. Finly & Co., 512 F.2d at 1275.

99. *See* Steuer, *supra* note 96 at 113 (noting that an economic analysis is required by *Sylvania* and distinguishing it from the *Tampa* qualitative substantiality standard.) *See also*, KINTNER, *supra* note 96, at 286 ("After *Tampa Electric*, however, the practical difference between Section 1 of the Sherman Act and Section 3 of the Clayton Act have nearly disappeared."). *See also*, SULLIVAN & HARRISON, *supra* note 6, at 183 ("*Tampa Electric* suggested that exclusive dealing should be analyzed under an approach very similar to the rule of reason.). *See also* Steuer, *supra* note 96 at 109 (indicating that the Court in Tampa applied some degree of a rule of reason analysis).

100. 337 U.S. 293 (1949).

101. 365 U.S. 320 (1961).

102. SULLIVAN & HARRISON, *supra* note 6, at 180.

103. Standard Oil Co. v. United States, 337 U.S. at 295. The Western Area comprised Arizona, California, Washington, Idaho, Nevada, and Utah. *Id.*

104. *Id.* at 314.

105. *Id.*

106. *Id.* The company owned service stations sold 6.8% of this amount, and the remainder was sold to industrial users. *Id.*

107. Standard Oil Co. v. United States, 337 U.S. at 314.

108. *Id.*

109. *Id.* at 295.

In *Tampa,* the Court confronted the issue of exclusive dealing again, this time in the context of a utility's effort to enforce a twenty year contract for all of its requirements for coal from the defendant supplier.[110] The Court described the analysis required for determining whether an exclusive dealing contract forecloses a substantial share of the market.[111] The first step entails determining the line of commerce involved.[112] Second, the area of the competitive market must be delineated.[113] Third, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market.[114] In order to determine substantiality, it is necessary to weigh the probable effect of the contract on the market in question by taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the market, and the probable immediate and future effects of foreclosure on that share of the market.[115] The Court found that the foreclosure of less than one percent of the market for coal was not substantial, that there were no foreclosure effects, and therefore, no violation of section 3.[116] However, the Court did acknowledge that it was not dealing with "myriad outlets with substantial sales volume coupled with an industry wide practice of relying on exclusive dealing contracts, as in *Standard [Stations].*"[117]

2. *Applying the Clayton Act to the Hypothetical*

In order to prove a violation of section 3 of the Clayton Act, Teltek must establish the line of commerce, delineate the relevant market, and show a substantial lessening of competition in the market. Exclusive dealing primarily impacts interbrand competition, unlike other vertical restraints,[118] and by itself will never diminish intrabrand competition.[119]

The first step for Teltek involves defining the line of commerce. In the Teltek hypothetical, the line of commerce is camcorders. Next, a court will define the area of effective competition. This is accomplished by ascertaining where the seller operates and where the consumer can practicably turn for supplies.[120] While the seven hypothetical manufacturers all operate in Japan and also export their products, Japanese consumers will predominately be limited to shopping in the local marketplace for such a product. Thus, the area of effective competition is the Japanese domestic market.

With Japan considered as the relevant market region, it must be decided if there is a foreclosure of a substantial share of this market. Foreclosure occurs where exclusive dealing

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110. Tampa Electric Coal Co. v. Nashville Coal Co., 365 U.S. at 321-22.

111. *Id.* at 327.

112. *Id.* at 330.

113. *Id.* at. 329. This is the area in which the seller operates and to which consumers can practicably turn for supplies. *Id.* at 327. The Court cited as support both Standard Oil Co. v. United States, 337 U.S. 293 (1949), which applied section 3 of the Clayton Act, and United States v. Columbia Steel Co., 334 U.S. 495 (1948), applying section 1 of the Sherman Act). Tampa Electric Coal Co. v. Nashville Coal Co., 365 U.S. at 321-322.

114. Tampa Electric Coal Co. v. Nashville Coal Co., 365 U.S. at 328.

115. *Id.* at 329.

116. *Id.* at 332, 334.

117. *Id.* at 334.

118. SULLIVAN & HARRISON, *supra* note 6, at 177-78.

119. Steuer, *supra* note 96, at 109.

120. Tampa Electric Company v. Nashville Coal Company, 365 U.S. at 327.

closes outlets to manufacturers.[121] In determining the degree of foreclosure, it is necessary to look at both the percentage of outlets closed and the percentage of the total sales in that market.[122]

Teltek may decide to sue all or some manufacturers. For example, seven of the top eight hypothetical manufacturers in Japan have foreclosed approximately eighty percent of thedistribution outlets and account for eighty percent of the market sales. This means that forty eight percent of the market is contractually tied to the seven manufacturers.[123] However, Teltek may decide for strategic reasons that it would be better to litigate only against the top three firms. These firms have foreclosed over fifty percent of the distribution channels and account for close to sixty percent of the total market sales. Thus, these three firms capture thirty percent of the market by exclusive dealing contracts.[124] If Teltek should decide to pursue the latter course, the foreclosure in the rest of the market remains relevant, as shown by the Court both in *Standard Stations*[125] and *Tampa*.[126] A court will take notice of the industry practice of exclusive dealing, the additional outlets foreclosed, and the percentage of total market sales attributable to these outlets.

In either case, a court should find a substantial lessening of competition by the foreclosure of Japan's distribution channels. In *Standard Stations*, the court found contractual ties foreclosing sixteen percent of the independent retailers amounting to a little less than seven percent of the market. These figures are still relevant for comparison because, even though the Court modified the *Standard Stations* rigid quantitative substantiality test in *Tampa*, it did not indicate that the result in *Standard Stations* would be any different.[127] In Teltek's situation, at a minimum the manufacturer's contractual ties have foreclosed thirty percent of the retailer outlets and a similar percentage of the market share. These contracts substantially lessen competition and will probably be found to violate section 3 of the Clayton Act.

3. *The Sherman Act*

Exclusive dealing antitrust violations are generally governed by the Clayton Act. However, when the challenged exclusive dealing does not involve commodities, claims may be brought under section 1 of the Sherman Act.[128] Teltek's claim involves the sale of commodities. However, plaintiffs frequently plead violations of both statutes when bringing

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121. SULLIVAN & HARRISON, *supra* note 6, at 178.

122. Steuer, *supra* note 96, at 117.

123. This number is derived from the fact that the eight manufacturers had exclusive dealing arrangements with 80% of the retailers and that 60% of this exclusive dealing was established by contract. *See supra* notes 71-78 and accompanying text (setting forth the relevant percentages).

124. This number is derived from the fact that the 3 manufacturers had exclusive dealing arrangements with over 50% of the retailers and 60% of this exclusive dealing was established by contract. *See supra* notes 71-78 and accompanying text (setting forth the relevant percentages).

125. *See supra* note 109 and accompanying text (noting the industry practice of utilizing exclusive dealing contracts).

126. *See supra* note 117 and accompanying text (distinguishing the fact situation from one which involves an industry-wide practice of exclusive dealing).

127. American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d at 1251.

128. KINTNER, *supra* note 96, at 278-79. American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d at 1239.

an antitrust violation case which concerns exclusive dealing.[129] Therefore, Teltek's case will also be analyzed under the analytical approach and burden of proof established for section 1 cases.

Continental T.V., Inc v. G.T.E. Sylvania., Inc.,[130] involved an alleged violation of section 1 of the Sherman Act.[131] In that case, the issue involved a location restraint, which is a type of territorial restraint, placed on franchisees.[132] Interpreting section 1 of the Sherman Act, the Court adopted the rule of reason analysis for non-price vertical restraints.[133] The rule of reason analysis takes into consideration both the anticompetitive impact and the procompetitive effects of a vertical restraint.[134] While this decision is significant for the rule it adopted, it has been criticized as giving little guidance for applying the rule.[135] Some of the procompetitive economic effects which were identified by the Court included assistance at market entry,[136] fostering promotional and service activities and protecting them against free rider problems,[137] and protection of product quality and customer safety.[138] The Court stated further that interbrand competition was the primary concern of antitrust law.[139]

In addition to having its complaint subject to the rule of reason analysis under the Sherman Act, the plaintiff also bears a greater burden of proof than the burden of proof for a violation of the Clayton Act.[140] Under section 3 of the Clayton Act, the plaintiff must prove that the effect of the contract may be to substantially lessen competition.[141] In contrast, under section 1 of the Sherman Act, the plaintiff must establish that the challenged

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129. *See, e.g.* Standard Oil Co. v. United States, 337 U.S. 293 (1949). Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961). Twin City Sportservice, Inc. v. Charles O. Finly & Co., 512 F.2d 1264 (9th Cir. 1975). American Motor Inns, Inc. v. Holiday Inns, Inc. 521 F.2d 1230 (3rd Cir. 1975) (providing examples of plaintiffs pleading violations of both acts).

130. 433 U.S. 36 (1977).

131. *Id.* at 36.

132. *Id.* It must be noted that this type of vertical restraint impacts intrabrand competition, and one of its justifications is that it can enhance interbrand competition. SULLIVAN & HARRISON, *supra* note 6, at 148. This differs from exclusive dealing where the primary impact is on interbrand competition. *Id.* at 178.

133. *Id.* at 59. One of the most frequently cited statements of the rule of reason states that

> [t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress of even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restrain was imposed the nature of the restraint and its effect, natural or probable.

Id. at 50 n.15 *quoting* Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

134. *Id.* at 54-56.

135. James, R. Rill, *Non-Price Vertical Restraints Since* Sylvania: *Market Conditions and Dual Distributions*, 52 ANTITRUST L. J. 95, 95-96 (1983) [hereinafter Rill]. SULLIVAN & HARRISON, *supra* note 6, at 170.

136. Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. at 54.

137. *Id.* at 55.

138. *Id.* at 55 n.23.

139. *Id.* at 51 n.19.

140. Tampa Electric Coal Co. v. Nashville Coal Co., 365 U.S. at 335 "We need not discuss the respondents' further contention that the contract also violates § 1 and § 2 of the Sherman Act, for if it does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden by those of the former." *Id.*

141. 15. U.S.C. § 14 (1993).

practice imposes an unreasonable restraint on trade.[142] This entails a greater showing of anticompetitive effect, as compared to the procompetitive effect.[143] The limited number of cases which have upheld a finding of an unreasonable restraint on trade demonstrate the difficulty of carrying this burden of proof under the rule of reason analysis.[144]

However, the Second Circuit Court of Appeal's decision, in *Eiberger v. Sony Corp of America*,[145] gives some guidance as to the factors that Teltek has to establish in order to be successful on the merits in a case concerning territorial restraint, which differs from exclusive dealing.[146]

The plaintiff had been an authorized dealer of Sony office equipment.[147] He alleged that the warranty fees extracted from dealers by Sony Corp. of America (Sonam) when dealers sold products outside of their designated sales area, and that his termination by Sonam for his refusal to pay those fees violated section 1 of the Sherman Act.[148] The court found that Sonam employed the warranty fee system as a means to enforce territorial restraints on its distributorships.[149] This restraint resulted in the anticompetitive effect of decreased intrabrand competition.[150]

Sonam attempted to justify this restraint by arguing that this system was required to provide customer service, and that its status as a new entrant made this restraint reasonable.[151] However, the court found that Sonam's intent in adopting this revised warranty system was not to ensure customer service but instead was created to protect territories, since customer service had been established by its previous warranty system.[152] Additionally, the court discounted Sonam's argument that it needed this device as a new entrant in the market, on the grounds that it had gained twelve percent of the market share in its four years of business, was continuing to grow, and that Sonam and four other manufacturers accounted for ninety-six percent of the total sales.[153] The court further found that the elimination of intrabrand competition allowed the dealers to maintain their

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142. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. at 49. The restriction in franchise agreement between manufacturer of televisions and retailer restricting the sales location was judged under the rule of reason analysis to determine whether the agreement imposed an unreasonable restraint on trade. *Id.*

143. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d at 1275 (raising section 1 of the Sherman Act as a defense in case involving exclusive concession franchise contract for event at major baseball stadium). The court stated that the analysis of section 3 cases applied to section 1 cases; however, the burden of proof is greater in the latter. *Id.*

144. *See* Graphic Products Distributors, Inc. v. Itek Corp., 717 F.2d 1560, 1578 (11th Cir. 1983) (affirming jury verdict finding that territorial restraints placed an unreasonable restraint on trade). *See* Eiberger v. Sony Corp. of America, 622 F.2d 1068, 1081 (2d Cir. 1980) (affirming the trial court's verdict that the warranty system that was used to maintain the distributorships' territorial restraints placed an unreasonable restraint on trade).

145. 622 F.2d 1068 (2d Cir. 1980).

146. *See supra* note 78 and accompanying text (distinguishing the competitive impact of these restraints).

147. *Id.* at 1070.

148. *Id.* The machines carried a ninety day service warranty, and the dealership agreement provided that the dealer would take responsibility for this service. *Id.* at 1070-71.

149. *Id.* at 1079. The warranty system which existed prior to the one under discussion in this litigation provided that the dealer could transfer the responsibility for service to another dealer and pay a fee. *Id.* at 1071. The revised system provided that there was an automatic fee charged for each machine sold outside of the dealer's territory. *Id.* at 1072-73.

150. *Id.*

151. *Id.* at 1078-80.

152. *Id.* at 1077-79.

153. Eiberger v. Sony Corporation of America, 622 F.2d at 1080-81.

sales at full list price, and in some cases, at substantially above the manufacturer's suggested list price.[154] The court held that given these facts, the warranty system acted as an unreasonable restraint on trade in violation of section 1 of the Sherman Act.[155]

4. Applying the Sherman Act to the Hypothetical

Ascertaining the legality of non-price vertical restraint involves determining first, whether or not there is a significant anticompetitive effect, and second, whether or not the procompetitive effects justify the restraint.

In section 1 exclusive dealing cases, the courts have performed the three-step analysis defined in *Tampa*, which applied section 3, to define the extent of the anticompetitive effect.[156] Then, if foreclosure is shown, under a rule of reason analysis the defendant will have an opportunity to justify the restraint. Due to the fact that exclusive dealing primarily impacts interbrand competition, unlike other vertical restraints,[157] and by itself never diminishes intrabrand competition,[158] the analysis will include economic factors relevant to exclusive dealing which are not necessarily the same factors relevant to other types of non-price vertical restraints, such as the territorial restraint in *Sylvania*.[159]

a. Plaintiff's Case-in-Chief: Anticompetitive Effects

The analysis regarding line of commerce, market delineation and degree of foreclosure set forth in the Clayton Act section of this Comment is applicable to the threshold issues which Teltek must establish in a section 1 case.[160] To briefly summarize, at a minimum the hypothetical manufacturer's contractual ties have foreclosed thirty percent of the retailer outlets and a similar percentage of the market share.[161] The foreclosure could be found to be as great as forty eight percent.[162] However, due to the necessity of proving an unreasonable restraint on trade with the Sherman Act, this foreclosure will not by itself establish an antitrust violation. A court will consider the foreclosure in light of the availability of alternative methods of entry.[163] Therefore, when addressing the foreclosure

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154. *Id.* at 1080.

155. *Id.*

156. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d at 1275. American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d at 1250. *See supra* notes 112-15 and accompanying text (setting forth the three step analysis).

157. SULLIVAN & HARRISON, *supra* note 6, at 177-78.

158. Steuer, *supra* note 96, at 109.

159. *Id.* at 113.

160. *See* KINTNER, *supra* note 96 at 281 (noting that lower courts have freely applied the Supreme Court's Clayton Act analyis approach to cases under section 1 of the Sherman Act). *See supra* notes 118-27 and accompanying text (analyzing the hypothetical situation under section 3 of the Clayton Act).

161. *See supra* note 124 and accompanying text.

162. *See supra* note 123 and accompanying text.

163. Steuer, *supra* note 96, at 123-24. Analysis of alternative methods of entry may also be relevant to an allegation of a violation of section 3 of the Clayton Act. In *Joyce Beverages v. Crown Royal Cola Co.*, 555 F.Supp. 271, 278 (S.D.N.Y. 1983), the court noted that the Seven Up Company had not carried its burden of proving that its product was foreclosed from the market because distributors, besides the defendant, had expressed a willingness to distribute its new product called LIKE; the defendant was not the company's only choice for a distributor, just its first choice; and, LIKE could not be considered a new entrant considering the prestige, resources, and contacts of the Seven Up corporation. *Id.*

issue in its case in chief, Teltek must present evidence disputing the availability and effectiveness of the outlets which are not tied to the manufacturers, specifically Japanese import agents and vertical integration.

When deciding whether to market a product, one of the primary criteria for the *sogo shosha*, the large trading companies in Japan, appears to be whether or not the products will compete directly with the domestic products which the firm is already carrying.[164] As for the utilization of the smaller sole import agents, this can be an unsatisfactory alternative because the manufacturer frequently has to relinquish control of marketing, selling price, and sales promotion.[165]

Additionally, Teltek should present evidence on the obstacles it faces in establishing its own network of distribution by becoming vertically integrated. Vertical integration means the company attempting to enter the market has to operate both as a manufacturer and as a retailer.[166] This significantly raises the cost of entry into the market.[167] Rental costs for warehouses are fifty to one hundred percent higher than all of the other industrialized countries, and rental for retail stores runs one hundred to two hundred percent higher.[168] Furthermore, the legal restrictions on wholesaling and retailing act as an added deterrence to vertical integration for Teltek.[169]

The evidence demonstrates a substantial degree of foreclosure and a lack of alternative channels. For Teltek, it is possible to argue that at least at the threshold stage, its antitrust case is stronger than that of *Eiberger*. The basis for this contention rests in the nature of the anticompetitive effects involved. The market foreclosure with Teltek causes an interbrand anticompetitive effect in the marketplace, whereas the anticompetitive effect which the court found in *Eiberger* concerned intrabrand competition.[170] The *Sylvania* decision implicitly establishes that intrabrand competition is of greater concern than interbrand competition.[171] Having alleged an interbrand anticompetitive effect and having demonstrated a significant amount of foreclosure, a court should find that Teltek satisfied the threshold question of substantial restraint and place the burden on the defendants to justify this restraint.

b. Defendants' Case-in-Chief

The balancing, or rule of reason, analysis entails consideration of procompetitive interbrand effects. The defendants will argue that their exclusive dealing agreements are attractive to both the buyer, who ensures a dependable source of supply, and the seller, who gains a ready market.[172] They will assert that having the dealers focus their efforts and

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164. PHASE I, *supra* note 15, at 36.

165. *Id.* at 41. Sole import agents may also engage in exclusive dealing contracts with the manufacturers whose products it decides to import. *Id.* This tends to negate their potential as an alternative distribution channel. *Id.*

166. SULLIVAN & HARRISON, *supra* note 6, at 179.

167. *Id. See* Steuer, *supra* note 96, at 124.

168. PHASE I, *supra* note 15, at 124 (referring to a presentation before the Japanese Fair Trade Commission).

169. *See id.* (giving a brief description the most significant impediments).

170. *See supra* notes 146-50 and accompanying text (describing the territorial restraint in *Eiberger*).

171. *See supra* notes 130-39 and accompanying text (discussing the *Sylvania* decision).

172. SULLIVAN & HARRISON, *supra* note 6, at 179. *See*, PHASE I, *supra* note 15, at 105.

their resources on promoting one product line is more effective[173] and promotes interbrand competition.[174]

The defendants will also argue that the structure of distribution *keiretsu* enables them to reduce distribution costs by simplifying marketing channels, allowing bulk shipments, and rationalizing inventory controls.[175] Furthermore, they will assert that the agreements have resulted in many benefits in the service arena, such as promoting customer service by emphasizing specialized knowledge and experience, improving post-sale service, and maintaining quality control.[176]

c. Plaintiff's Rebuttal

Teltek has two primary arguments with which to rebut the defendants' evidence of procompetitive effect. First, there is considerable doubt about whether any of the cost savings of the distribution *keiretsu* have been passed on to the Japanese consumer. Investigation into the results of the exclusive dealing in the distribution *keiretsu* have indicated that:

> Reductions in marketing costs, for example, are seldom passed on to customers. This is because the aim of the *keiretsu* integration in distribution is to stabilize prices at the distribution stage by promoting product differentiation. Interbrand competition is eliminated by distribution *keiretsu* and the manufacturer's business and pricing policies are more easily realized even without binding instructions . . . .[177]

Second, commentators who advocate these procompetitive effects have placed caveats on their arguments supporting exclusive dealing. They admit that exclusive dealing will pose a substantial barrier to entry where a large percentage of the industries' retail outlets are already foreclosed.[178] This is precisely the factual situation which Teltek is facing. Eighty percent of the retail outlets are tied to manufacturers and sixty percent of these ties are contractual.

Other commentators have suggested that a highly concentrated market can contribute to the anticompetitive effect.[179] The market in Japan has been characterized as strongly oligopolistic.[180] This structure severely limits price competition.[181] In Japan, the power

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173. PHASE I, *supra* note 15, at 105.

174. SULLIVAN & HARRISON, *supra* note 6, at 179 (1988). *See generally*, Steuer, *supra* note 96 at 124-33.

175. PHASE I, *supra* note 15, at 56.

176. *Id.*

177. *Id.* (quoting Hideto Ishida, *Anticompetitive Practices in the Distribution of Goods and Services in Japan: The Problem of the Distribution Keiretsu*, 2 J. JAPANESE STUD. 324-25 (1983)).

178. *Cf.* Marvel, *supra* note 78, at 5 (noting that exclusive dealing may be adopted as a means to erect barriers to entry to competing manufacturers). *See also*, Steuer *supra* note 96, at 130 "[U]nderlying the procompetitive effects of exclusive dealing is the need for enough distributors to serve every supplier. If an exclusive dealing arrangement significantly forecloses other suppliers, the arrangement may inhibit rather than promote interbrand competition." *Id.*

179. Panel Discussion, ANTITRUST DOS AND DON'TS OF DISTRIBUTION, 52 ANTITRUST L. J. 363, 382 (1984)(comment by Mr. Joshua Greenberger). *See* Rill, *supra* note 188, at 108.

180. BATZER & LAUMER, *supra* note 67, at 195.

of this small group of firms manifests itself in the firms' ability to establish RPM,[182] thereby retaining the procompetitive benefits within the *keiretsu* rather than passing the savings on to consumers.

Teltek can refute the consumer cost savings procompetitive effect of the structure. It can also show that the composition of the Japanese market eliminates many of the procompetitive benefits that are thought to flow from exclusive dealing. Teltek may be able to narrow the issues down to the point where a court will have to weigh the substantial foreclosure versus the explanation that the structure provides better service. Due to the eighty percent foreclosure, it is unlikely that this single business reason will provide sufficient justification for the court to hold that this is a reasonable restraint. By finding that this is an unreasonable restraint on trade, a court could then hold the defendants in violation of U.S. antitrust laws, specifically section 1 of the Sherman Act.

B. Subject Matter Jurisdiction

As demonstrated, the exclusive dealing of the *keiretsu* may violate both the Sherman Act and the Clayton Act. Thus, it must be determined whether a court possesses subject matter jurisdiction to adjudicate such claims. Both statutes contain jurisdictional language in their text. However, while the Sherman Act contains a statutory provision for subject matter jurisdiction governing extraterritorial application, the Clayton Act contains no similar subject matter jurisdiction provision.[183] Therefore, subject matter jurisdiction under each of these statutes must be analyzed separately.

1. The Sherman Act

The landmark decision in *United States v. Aluminum Co. of America*[184] established the broad jurisdictional reach of the Sherman Act and articulated the "effects" test.[185] In *Alcoa*, the foreign aluminum producers had imposed a quota on the production and sale of aluminum, including restraints on imports into the U.S.[186] The court held that if the agreement to impose quotas was intended to and did affect U.S. imports or exports, the Sherman Act would apply.[187] Subsequently, courts reformulated the test for extraterritorial subject matter jurisdiction in a myriad of ways.[188] Congress also perceived the need for legislative action to resolve the problems resulting from these inconsistent standards.[189]

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181. SULLIVAN & HARRISON, *supra* note 6, at 33. If one seller increases output and reduces its price in an effort to capture more sales, other producers of the oligopoly would follow suit. *Id.* at 32-33. If the price change is not concealed, this reaction will be swift. *Id.* at 33. The price cutter will gain little. *Id.* From this scenario, it follows that there is little incentive for price competition. *Id.* The more interdependence that exists among firms in an oligopoly, the more the market may result in conduct similar to a monopoly. *Id.*

182. *See supra* notes 86-88 and accompanying text.

183. Chatham Condominium Ass'ns v. Century Village, Inc., 597 F.2d 1002, 1010 (5th Cir. 1979) (describing the jurisdictional scope of the Clayton Act as being much narrower than the Sherman Act).

184. 148 F.2d 416 (2d Cir. 1945).

185. *See* Peter N. Swan, *International Antitrust: The Reach and Efficacy of United States Law*, 63 OR. L. REV. 177, 196-199 (describing briefly the maturation of the effects doctrine).

186. *Id.* at 440-41.

187. *Id.* at 444.

188. Murphy, *supra* note 96, at 807.

189. H.R. REP. No. 686, 97th Cong., 2d Sess. 6,9, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 2487.

In 1982, Congress amended the Sherman Act by passing the Export Trading Company Act, which added section 7 of the Sherman Act.[190] This section sets forth the conditions for subject matter jurisdiction that must exist in a case involving trade or commerce with other nations before the provisions of the Sherman Act will apply.[191] The statute provides in part:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless (1) such conduct has a direct, substantial, and reasonably foreseeable effect . . . (B) on export trade or export commerce with foreign nations, or a person engaged in such trade or commerce in the United States; and such effect gives rise to a claim under section 1 to 7 of this title other than this section.[192]

Teltek will have to prove the following elements in order to establish a court's subject matter jurisdiction. First, the actions of the *keiretsu* must fall within the category of "conduct involving trade or commerce . . . with foreign nations."[193] Second, the effect of this conduct must be direct, substantial, and reasonably foreseeable.[194] Third, Teltek must be included in the classification of persons engaged in export trade within the United States.[195]

In order to determine the conduct this statute encompasses, it is helpful to refer to the rationales for subject matter jurisdiction developed through Sherman Act jurisprudence dealing with conduct in interstate commerce.[196] In the interstate setting, a court has subject matter jurisdiction where the conduct is in the flow of interstate commerce, or the conduct affects interstate commerce.[197] Conduct of an intrastate nature having an affect on interstate commerce is included in the latter category.[198] Therefore, in the context of commerce with foreign nations, the conduct must either be in the flow of foreign commerce or affect export commerce.[199] A difference exists in the foreign context where the restrictive practice itself must have a substantial effect.[200]

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190. Pub. L. No. 97-2920, 96 Stat. 1246 (Oct. 8, 1982).

191. 15 U.S.C. §6(a) (1993). The codification of a jurisdictional standard presents businesspeople and attorneys with an explicit standard against which to assess whether certain conduct will trigger application of the Sherman Act. Murphy, *supra* note 96 at 805-806.

192. 15 U.S.C. § 6(a) (1993).

193. Murphy, supra note 96, at 791.

194. *Id.* at 807.

195. *See* The 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F.Supp. 494 (M.D.N.C. 1987) (dismissing an antitrust claim because foreign company plaintiff failed to meet the jurisdictional requirement of section 7).

196. Murphy, supra note 96, at 792.

197. *Id.* A consensus exists that the foreign commerce clause of the previous Sherman Act was approached in the same manner. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 802. In the interstate commerce setting, it is sufficient if the conduct effects a substantial amount of interstate commerce. *Id.* There is no requirement that the restraint be substantial as in the foreign context. *Id.*

While all of the manufacturers in the hypothetical engage in export trade to the U.S., the conduct being challenged by Teltek occurs completely within Japan's borders.[201] Therefore, Teltek must prove the exclusive dealing affects foreign commerce, and that this effect is substantial. There is no clear standard for when the effect can be considered substantial.[202] However, Teltek could plead the following facts. The eight K manufacturers account for eighty percent of the total sales in the market. They are tied to over eighty percent of the distribution channels. The restrictive effect this system has had on foreign commerce is shown by the fact that penetration into the Japanese market for consumer electronics from any non-Japanese manufacturer has been limited to three percent of the market.[203] Additionally, Teltek should include in its pleadings the details of its attempt to enter into the Japanese market.[204] With these pleadings, Teltek should be able to establish that there was a substantial effect on U.S. export commerce.

The second element required to establish subject matter jurisdiction is a demonstration of a direct, substantial, and reasonably foreseeable effect on foreign commerce.[205] The discussion above confirms that the exclusive dealing has had a substantial effect on U.S. export commerce. Whether the effect was direct and reasonably foreseeable remains to be proven.

Few cases have arisen, subsequent to the amendment to the Sherman Act, which address the issue of what is considered a direct effect.[206] Therefore, it is necessary to refer to case law antedating the amendment to define the term direct. In *Sulmeyer v. Seven-Up Co.*,[207] the plaintiff alleged that the defendants' agreements with bottlers in foreign countries, which

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201. Daishowa International v. North Coast Export Co., 1982-2 Trade Cases ¶ 66,774, 1982 WL 1850. The plaintiff alleged that the defendants had formed buyer's cartel which fixed the price for export wood chips and boycotted plainitff who refused to accept the trading conditions. *Id.* at *1-*2. The primary defendant in this case, a Japanese corporation, alleged that all of the challenged conduct occurred outside of the U.S. *Id.* at *4. The District Court held that there was subject matter jurisdiction. *Id.* at *6.

202. *See* Timberlane Lumber Co. v. Bank of America 549 F.2d 597, 611 (9th Cir. 1976) (noting that the nature of the effect required for jurisdiction has been discussed in only a few cases and that the standard has not been put to a real test).

203. *See supra* notes 71-72 and accompanying text (setting forth both the actual and hypothetical foreclosure percentages).

204. *See* Continental Ore Company v. Union Carbide, 370 U.S. 690 (1962) (involving claims that defendants violated section 1 and section 2 of the Sherman Act by monopolizing, by conspiring to monopolize, and by conspiring to restrain trade). The plaintiff pleaded specific instances where its attempts to enter and maintain itself in the market were frustrated. *Id.* at 694.

205. *See supra* notes 193-95 and accompanying text (outlining the requirements for subject matter jurisdiction).

206. *See* Eurim-Pharm GmbH v. Pfizer, Inc., 593 F.Supp. 1102, 1106 (S.D.N.Y. 1984) (dismissing the complaint on the grounds that the plaintiff failed to establish that the conduct resulted in an anticompetitive effect on U.S. commerce). *See* The 'In' Porters, S.A. v. Hanes Printables, Inc., 663 F.Supp. 494, 500 (dismissing on the grounds that as a foreign company, plaintiff did not fulfill the jurisdictional requirements). *See also* McGlinchy v. Shell Chemical Co., 845 F.2d 802 (9th Cir. 1988) (dismissing on the grounds there was no anticompetitive effect on U.S. commerce); Limamuiga Tours v. Travel Impressions, 617 F.Supp. 920, 924 (E.D.N.Y. 1985). A destination service operator (DSO), which provided local services for tour customers on a Caribbean Island, charged a wholesale tour operator with antitrust violation alleging that the DSO's exclusion from the market resulted in an anticompetitive effect on American consumers. *Id.* at 924. The court found that if there was any direct anticompetitive effect it would experienced by the travel agencies, not the consumers. *Id.* at 925. As the defendant in the case was the largest tour agency, it would suffer if there was any anticompetitive effects. *Id.* The court considered this to be an "absurd twist" and held that there was no anticompetitive effect. *Id.* at 924-25.

207. 411 F. Supp. 635 (S.D.N.Y. 1976).

prohibited these bottlers from producing soft drinks of the same flavor as the defendant's, precluded plaintiff from access to the markets, resulted in a monopoly, and restrained trade.[208] The plaintiff was engaged in the business of supplying Bubble Up concentrate to franchised bottlers in foreign countries, and the defendant, Seven Up, conducted a similar business.[209] The court held that plaintiff's allegations that the products were in direct competition and that defendants' actions limited plaintiff's business were sufficient to establish direct harm, a prerequisite for standing to sue.[210]

Teltek and the Japanese manufacturers engage in the business of manufacturing camcorders. Teltek is alleging that the agreements between the Japanese manufacturers, wholesalers, and retailers prohibit these dealers from selling the same type of product from a competitor and preclude Teltek from access to the Japanese market. For the reason that Teltek can establish that its camcorders are in direct competition with the camcorders of the Japanese manufacturer and that their actions restrict its business, according to *Sulmeyer v. Seven-Up Co.*, Teltek can establish direct harm.

The final element entails demonstrating that the effect was reasonably foreseeable. This portion of the statute replaced the judicial proof requirement of intent, thereby introducing a more objective standard.[211] This standard is a variant of the reasonable person standard.[212]

Teltek must show that a reasonable person exercising practical business judgment would realize that exclusive dealing would have a direct and substantial effect on U.S. exporters.[213] The anticompetitive effect of the exclusive dealing arrangements may not have been reasonably foreseeable when initially entered; however, this does not prevent a U.S. court from possessing subject matter jurisdiction.[214] The court's jurisdiction will be limited to conduct occurring during the period in which the anticompetitive effect on foreign commerce was foreseeable.[215] As the discussion in the section of the history of the *zaibatsu* and *keiretsu* demonstrates,[216] business practices developed during the rebuilding of the Japanese economy may have been rational at the time. However, as Japan evolved into a world economic leader, trade with Japan has assumed increasing importance, and its barriers to trade have received an increasing amount of criticism from its trading partners.[217] In light of this situation, it is arguable that the manufacturers were able to reasonably foresee the effect on the rest of the world's exports to Japan by their continued foreclosure of distribution channels.

The third condition for establishing subject matter jurisdiction can be easily satisfied by Teltek introducing evidence of its status as a U.S. corporation engaged in export commerce. Upon having fulfilled the requirements of establishing the subject matter jurisdiction of the

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208. *Id.* at 637.
209. *Id.* at 637.
210. *Id.* at 638-39.
211. Murphy, *supra* note 96, at 807.
212. *Id.*
213. *Id.* at 808.
214. *Id.* at 809.
215. *Id.*
216. *See supra* notes 28-42 and accompanying text (describing the structures and their evolution).
217. JOHNSON, *supra* note 14, at 238. During the general meeting of GATT in 1959, the U.S. and western European countries were calling for Japan to open its markets to foreign products. *Id.* The U.S. government is still making this request in 1993. Schlesinger, *supra* note 11, at A11.

U.S. court, Teltek could proceed with the substantive merits of its section 1 antitrust claim.[218]

2. The Clayton Act

Unlike the Sherman Act, the extraterritorial reach of section 3 of the Clayton Act is not expressly delineated. Therefore, in order to determine jurisdiction under the Clayton Act, it is necessary to address additional issues that were not present in the analysis of subject matter jurisdiction under the Sherman Act. These concerns include whether section 3 has extraterritorial reach and whether its breadth encompasses conduct which occurs completely outside the U.S. but which affects U.S. export commerce.

The first issue is whether section 3 reaches any extraterritorial conduct. The text of section 3, which includes its jurisdictional language, provides in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . [to] make a sale or contract for sale of . . . commodities . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding, that the . . . purchaser thereof shall not . . . deal in the commodities of a competitor. . . where the effect may be . . . to lessen competition . . . .[219]

Section 1 of the Clayton Act defines "commerce" to include "trade or commerce . . . with foreign nations."[220] The use of this language appears to indicate that there will be some extraterritorial enforcement of the Clayton Act. However, within section 3 itself, the language becomes more restrictive by referring only to sales of commodities "for use, consumption, or resale within the United States."[221] The utilization of this phrase in some sections of the Clayton Act, along with its absence in other sections indicates that extraterritorial application of the Clayton Act is selective.[222] For the reason that all of the camcorders are sold within Japan, Teltek cannot satisfy the requirement of use, consumption, or resale within the U.S.[223] Therefore, Teltek will not be able to establish subject matter jurisdiciton under the Clayton Act and will not be allowed to prove the substantive merits of its Clayton Act claim.

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218. Murphy, *supra* note 96, at 813. Under section 7, comity is a separate issue that a court may address. *See id.* (citing to the House Report regarding the passage of the bill). *See supra* notes 224-38 and accompanying text (addressing the issue of comity).

219. 15 U.S.C. § 14 (1993).

220. 15 U.S.C. § 12 (1993).

221. 15. U.S.C. § 14 (1993).

222. *See* Franklin A. Gevurtz, *Using Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT'L. L. 211, 242 (1987) (noting the language difference between section 2(a) (15 U.S.C. § 13(a)) and 2(c) (15 U.S.C. § 13(c)) of the Robinson-Patman Act).

223. Reisner v. General Motors Corp., 511 F.Supp. 1167, 1177 (S.D.N.Y. 1981). Addressing a fact situation where all of the component parts were sold in Europe for use in Europe, the court held that these actions would not satisfy the Clayton Act requirement of use, consumption or resale within the U.S. *Id.*

V. ADDITIONAL CONCERNS

The international character of this litigation presents unique litigation concerns. A company must take into consideration such factors as the potential impact of a comity analysis a court, foreign discovery capabilities, and recovery potential.

A. *Comity*

Some argue that problems in the arena of international trade should be addressed by agreements and negotiations between the governments of the nations involved and not left for resolution by the U.S. court system.[224] The principles of sovereignty and comity act as the core for these arguments.[225] The judicial explanation states:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[226]

While there are no absolute rules of comity that must be followed, the other sovereign's interest must be taken into consideration.[227]

The Ninth Circuit acknowledged the relevance of this principle in the extraterritorial application of U.S. antitrust law in the celebrated case of *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*[228] The court established a requirement that a court must find that "the interest of, and links to, the U.S.—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify the assertion of extraterritorial authority."[229] The Court concluded that the following elements should be considered when making this determination: (1) the degree of conflict with foreign law or policy; (2) nationality or allegiance of the parties and the locations or principal places of business of corporations; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of effects on the U.S. as compared with those elsewhere; (5) the existence and extent of an explicit purpose to harm or affect U.S. commerce; (6) the foreseeability of such an effect; and (7) the relative importance to the violations charged of conduct within the U.S. as compared with conduct abroad.[230]

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224. PHASE II: JAPAN'S DISTRIBUTION SYSTEM AND OPTIONS FOR IMPROVING U.S. ACCESS, REPORT TO THE HOUSE WAYS AND MEANS, H.R. Doc. No. 332-283 121-123 (October 1990) (comments by business consultants and participants in the SII talks regarding the request that the *keiretsu* structure be eliminated).

225. A.D. NEALE & M.L. STEPHENS, INTERNATIONAL BUSINESS and NATIONAL JURISDICTION 12-13 (1988) [hereinafter NEALE & STEPHENS].

226. Hilton v. Guyot, 16 U.S. 139, 143 (1895).

227. NEALE & STEPHENS, *supra* note 225, at 13.

228. 549 F.2d 597 (9th Cir. 1976) (holding that the activities which had occurred in Honduras were within the jurisdiction of federal courts under the Sherman Act).

229. *Id.* at 613.

230. *Id.*

In *Mannington Mills, Inc. v. Congoleum Corporation,*[231] the Third Circuit Court of Appeals expressed substantial agreement with the *Timberlane* factors and added the following criteria to be considered in the balancing of the sovereign's interest: (1) the availability of a remedy abroad and pendency of foreign litigation; (2) the effect on U.S. foreign relations of U.S. judicial relief; (3) whether compliance with U.S. relief will place defendant in an untenable position vis-a-vis foreign law; (4) whether the U.S. would find a similar order by the foreign government acceptable if roles were reversed; and (5) the preemptive effect of any treaty.[232] Most courts have adopted, with some variations, these considerations and the comity balancing test.[233] However, in *Laker Airways Limited v. Sabena, Belgian World Airlines,*[234] the D.C. Circuit Court of Appeals rejected the utility and wisdom of comity interest balancing in the determination of the exercise of jurisdiction.[235]

When it amended the Sherman Act with the addition of Section 6(a), which deals with subject matter jurisdiction, Congress did not intend to affect the courts' authority to consider comity as a grounds for declining to adjudicate a case.[236] In the cases which have applied this section and found that the court does have subject matter jurisdiction, the traditional comity balancing analysis has been performed.[237] Therefore, a litigant in most situations must be prepared to argue that international comity concerns do not prohibit the court from adjudicating their claim.[238]

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231. 595 F.2d 1287 (3d Cir. 1979) (holding that the court had subject matter jurisdiction where 2 American litigants were challenging alleged antitrust activities abroad and had harmed export business).

232. *Id.* at 1297-98.

233. National Bank of Canada v. Interbank Card Ass'n, 666 F.2d 6, 8 (2d Cir. 1981) (retaining the comity balancing test while rejecting the first 2 parts of the tripartite *Timberlane* test for subject matter jurisdiction).

234. 731 F. 2d 909 (D.C. Cir. 1984) (granting a preliminary injunction designed to permit U.S. claim to go forward free from foreign interference).

235. *Id.* at 950.

236. H.R. REP. No. 686, *supra* note 189, at 13. The House Report states that "the bill [H.R. 5235] is intended neither to prevent nor encourage additional recognition of the special international characteristics of transactions." *Id.* Additionally, in his presentation of the bill on the floor of the House of representative, Rep. McClory stated that "H.R. 5235 in no way affects the authority of the court to consider such matters [such as comity] in cases where there is an anticompetitive domestic effect arising from exports or foreign trade." 128 CONG. REC.H4982 (daily ed. Aug. 3, 1982).

237. *In re* Insurance Antitrust Litigation, 723 F.Supp. 464, 487 (N.D. Cal. 1989) "Regardless of whether subject matter jurisdiction exists, this Court may determine that its jurisdiction under the antitrust laws should not be exercised on the grounds of international comity." *Id. In re* Insurance Antitrust Litigation, 938 F.2d 919, 933 (1991) (stating that the comity analysis is still relevant even though the requirements under U.S.C. § 6(a) will make it unusual for a court to find subject matter jurisdiction and then abstain from jurisdiction due to comity principle).

238. *See* Daishowa International v. North Coast Export Company, 1982-2 Trade Cases ¶ 64,774, 1982 WL 1850 (1982) (applying the Sherman Act to a Japanese buyers cartel where the alleged conduct occurred abroad). The court noted that there appeared to be no conflict with Japanese law. *Id.* at *5-*6. Additionally, the court considered it significant that the plaintiff would be unable to recover punitive damages if the case was litigated in Japan. *Id.*

B. Discovery Difficulties

A company seeking to obtain foreign discovery faces several potential barriers. It is a costly and time consuming procedure.[239] Additionally, even though Japan has not done so yet, a number of countries have passed legislation designed to block U.S. antitrust investigation by giving the country the power to forbid compliance with the discovery request.[240]

C. Potential Problems with Remedies

One of the enticing features to a plaintiff in a U.S. antitrust suit is the potential to get treble damages.[241] Some countries have removed this incentive by passing statutes preventing the enforcement of U.S. antitrust treble damages awards within their territories or against their citizens.[242] An additional statutory disincentive has been created in the United Kingdom. This provision, referred to as a claw back statute, enables a citizen or domestic business to recover from the original plaintiff any multiple, meaning non-compensatory, damage award of a foreign court.[243] One reason for these provisions could be that treble damages awards are viewed as punitive, potentially criminal in character, and not appropriate for international enforcement under traditional international law principles.[244] Due to the fact that the awards for private antitrust suits in Japan are significantly below U.S. awards[245] and that the Japanese government has already recommended during SII that the U.S. revise its treble damages awards,[246] it is arguable that Japan may follow the example of the United Kingdom.

IV. CONCLUSION

Joining the potential use of U.S. antitrust law as a wedge into the Japanese market with the perception that *keiretsu* impede U.S. export trade, this Comment analyzes whether U.S. antitrust law may successfully challenge the *keiretsu*. Although there are various *keiretsu* structures, the application of U.S. antitrust law was applied only to business practices of the distribution *keiretsu*.

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239. *Antitrust: U.S. Antitrust Laws can be used as Market Access Tool, Lawyer Says*, INT'L TRADE REP., Aug. 19, 1992 at 1417 [hereinafter *Market Access Tool*]; Mashushita Elec. Industrial Co. v. Zenith Radio, 475 U.S. 574, 577-578 (1985). The discovery in the *Japanese Antitrust Litigation* went on for years and produces multi-volumes worth of evidence. *Id. But see*, Rosenthal & Lipstein, *supra* note 4, at 5 (stating that this is not the norm and that at least in some types of antitrust litigation the expenditure of time and resources can be reduced significantly).

240. *See* MELVILLE L. STEPHENS, *"'Reasonable' Approaches to the Issue of Extra-Territorial Jurisdiction—The US Anti-Trust Example"* in 2 INTERNATIONAL ANTI-TRUST LAW: RECENT DEVELOPMENTS IN EEC AND U.S. ANTI-TRUST 91, 114-15 (Julian Maitland-Walker ed., 1984) (identifying these countries as Australia, Canada, Belgium, France, The Netherlands, the Phillipines and the United Kingdom).

241. *Market Access Tool, supra* note 239, at 1417.

242. STEPHENS, *supra* note 240, at 114-15.

243. *Id.*

244. *Id.*

245. *Antitrust: Structural Impediments Talks*, Int'l Trade Rep. (BNA) at 1348 (Aug. 5, 1992) [hereinafter *Structural Impediments*].

246. Matsushita, *supra* note 19, at 436-37.

With regard to whether these practices violate section 3 of the Clayton Act, precedent from the Supreme Court supports the conclusion that the exclusive dealing agreements of the *keiretsu* violate this law. However, a U.S. exporter seeking to use this provision will find that it faces an impossible subject matter jurisdiction hurdle. Therefore, the Clayton Act cannot be used as a tool to access the Japanese market.

Under Section 1 of the Sherman Act, a U.S. exporter will have an easier time establishing subject matter jurisdiction. However, such a plaintiff will face an obstacle in the form of higher burden of proof, namely that an unreasonable restraint of trade must be established. Additionally, the rule of reason analysis entails that a court take into account both the anticompetitive and procompetitive effects of the conduct in question. With the higher burden of proof and the possible business justifications for exclusive dealing, it is difficult to predict the outcome of such litigation. However, the potential exists to use the Sherman Act to wedge into the Japanese market.

The Japanese response to enforcement can take a variety of forms. It may decide to create barriers to the extraterritorial enforcement of U.S. antitrust laws, including discovery restrictions or remedy enforcement limitations.[247] In the alternative, Japan may take the path of stepping up its own enforcement of its antitrust laws. The Japanese Federal Trade Commission (JFTC) does currently have an investigation under way regarding some *keiretsu* business practices.[248] Furthermore, the Japanese government has acknowledged that some *keiretsu* practices do act as trade barriers. The JFTC may decided to address the most egregious practices while leaving the structure intact.

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247. *See U.S. Broadens Enforcement, supra* note 1, at 622 (reporting that the Japanese Ministry of International Trade planned to form a committee to explore measures which would prevent the U.S. from enforcing its antitrust laws in Japan, such as banning Japanese firms from testifying or surrendering proof to the U.S. Department of Justice).

248. *Structural Impediments, supra* note 245, at 1348 (discussing the investigations of the Japan Federal Trade Commission into the *keiretsu* which resulted from the Structural Impediments Commission and noting a scheduled investigation of the exlusionary business practices of the exclusionary effects of *keiretsu* in the auto, auto parts, glass and paper industries).